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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 545

CHARLES W. JAMIESON,

Appellant,

vs.

CHICAGO TITLE AND TRUST COMPANY,
AN ILLINOIS CORPORATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION

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Appellee, pursuant to Rule 16 of this Court, respectfully moves the court to dismiss this appeal on the grounds: (I) the judgment rests on an adequate non-federal basis; (II) no federal question was raised in or passed on by the State Courts; (III) the appeal does not present a substantial federal question.

NATURE OF PROCEEDINGS AND DETERMINATIONS MADE BY ILLINOIS STATE COURTS

Plaintiff, a shareholder of defendant, filed a suit in the Superior Court of Cook County, Illinois, seeking a personal judgment against defendant. The Superior Court dismissed the suit for want of equity on February 2, 1961. (Jurisdictional Statement, pp. 18-19.) The Illinois Appellate Court for the First District affirmed the decree of the Superior Court February 9, 1962. This decision is reported in the official reports in abstract form only at 33 Ill. App. (2) 477, 179 N. E. (2) 844. The Appellate Court opinion appears in full at pages 20 to 25 of plaintiff's Jurisdictional Statement. The Illinois Supreme Court, on May 24, 1962, denied plaintiff's petition for leave to appeal, without a written opinion, as reported in the official reports at 23 Ill. (2) 624.

STATEMENT

The Jurisdictional Statement does not contain a concise statement of facts sufficient to show the nature of plaintiff's suit or any questions he seeks to present.

As stated by the Illinois Appellate Court (Jurisdictional Statement, p. 20) the facts are not in dispute. The defendant is a corporation organized under the Illinois General Corporation Act and engaged in the abstract, title insurance and trust business in Illinois. Plaintiff is a shareholder and former employee of defendant. In 1943 and 1944 defendant invested certain of its surplus corporate funds in common stock of Chas. Pfizer & Co., Inc., a Delaware corporation. The investment was so profitable that in May, 1959, the stock was quoted on the New York Stock Exchange at $36. a share, while defendant's adjusted cost basis was only $1.60 a share. In May, 1959, defendant's Board of Directors declared a special dividend payable in this Pfizer stock at the rate of 1 Pfizer share for each 20 shares of defendant. In June, 1959, plaintiff, as owner of 100 shares of defendant, received his certificate for 5 Pfizer shares. Plaintiff returned the certificate for 5 Pfizer shares to defendant.

In May, 1960, plaintiff started a suit against defendant, its Treasurer, and all its directors in the Superior Court of Cook County, Illinois, in which he apparently claimed defendant did not have the right to invest surplus corporate funds in Pfizer stock. He prayed for an accounting and a judgment for damages. The individual defendants were never served and never became parties to the suit. After defendant filed a verified answer, both parties made motions for judgment on the pleadings and a judgment was entered dismissing plaintiff's action for want of equity. The Illinois Appellate Court affirmed this judgment and the Illinois Supreme Court denied the petition for leave to appeal.

ARGUMENT

I

THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

The plaintiff complained that defendant, without the right to do so, invested part of its surplus corporate funds in common stock of Chas. Pfizer & Co., Inc. Plaintiff, an individual shareholder of defendant, sought an accounting and damages from defendant for this purchase. In view of the fact that the Pfizer investment resulted in a very substantial gain to defendant and all its shareholders, plaintiff suffered no loss or damage from this purchase, and the Illinois court properly dismissed his suit for want of equity. It does not appear that any other result would have been possible. In any event the purchase was authorized by Illinois statutory and case law. (See Point III, p. 6 of this brief.)

II

NO FEDERAL QUESTION WAS RAISED IN OR PASSED ON BY THE ILLINOIS COURTS

Plaintiff apparently claims in his Jurisdictional Statement that Section 156 of the Illinois Corporation Act of 1933 (Sec. 157.156, Ch. 32, Illinois Revised Statutes, 1961) (Appendix p. 10) deprived him of due process and equal protection of the laws and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

The plaintiff did not raise any question concerning the validity of this statute on the alleged ground that it vio-

lated the Fourteenth Amendment, in the trial court (Superior Court of Cook County, Illinois), in the Appellate Court of Illinois, or in the Supreme Court of Illinois. Therefore, no question as to the possibility of this statute being repugnant to the Fourteenth Amendment was considered or passed upon by the Illinois Trial, Appellate or Supreme Courts. The Illinois statute requires that appeals, in cases involving construction of a Statute or the Federal or State Constitutions, be taken directly to the Supreme Court (Sec. 75 ch. 110 Ill. Rev. Stat. 1961, Appendix p. 10). The rules of both the Appellate and Supreme Courts of Illinois provide that no errors or points not mentioned in a party's brief may be considered or passed upon (Supreme Court Rule 39, Appellate Court Rule 7, See Appendix p. 10), and the Illinois courts hold that an alleged error is waived if it is not assigned and argued in the briefs filed in the Appellate and Supreme Court. *City of Lawrenceville v. Maxwell*, 6 Ill. (2) 42, 45, 126 N. E. (2) 671, 674; *Wilson v. Prochnow*, 354 Ill. 98, 100, 187 N. E. 914, 915; *People ex rel. Honeyager v. Burris*, 408 Ill. 68, 75, 95 N. E. (2) 882, 886.

This court does not have jurisdiction to decide whether constitutional rights protected by the Fourteenth Amendment have been violated unless this federal question was seasonably raised in accordance with the requirements of state law. *Penn. R. Co. v. Illinois Brick Co.*, **297 U. S. 447**; *Hulbert v. City of Chicago*, 202 U. S. 275, 280; *Mullers v. Commercial Loan & Trust Company*, 216 U. S. 613, 614; *Edelman v. California*, 344 U. S. 357, 358.

III

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The defendant was incorporated in Illinois under the general corporation laws of the state prior to 1919. The general corporation laws of Illinois prior to 1919 contained no provision expressly authorizing Illinois corporations to purchase or hold contingent stocks of other corporations, and the Illinois courts held they had no such inherent power. The 1919 General Corporation Act and the 1933 Business Corporation Act which superseded it each provided that Illinois corporations should have the right to purchase and hold the common stock of other domestic and foreign corporations. They also provided that the provisions of each of the new acts should apply to all existing corporations organized under any general law of the state. They also authorize payment of dividends in cash or property. (See Appendix pp. 39, 40.) Thereafter, the Illinois Supreme Court held that all corporations, whether organized before or after 1919, have the right to purchase and hold common stocks in the absence of an express restriction in their charters. *Lewis v. West Side Trust & Savings Bank*, 376 Ill. 23, 42-44, 32 N. E. (2) 907, 917-918.

In view of the fact that the 1872 General Corporation Act under which defendant was incorporated expressly reserved to the Illinois General Assembly the power to prescribe such regulations and provisions as it deemed advisable from time to time, which provisions and regulations should be binding on all corporations formed under the Act (Sec. 9 of the Illinois Corporation Act of 1872, Appendix p. 11), it is apparent that a change in the corporation laws which gave corporations greater flexibility as to investments they might make with their surplus corporate funds, is not repugnant to the Fourteenth Amendment.

CONCLUSION

Since the judgment in this case rests on an adequate non-federal basis, since no federal question was ever raised by plaintiff or passed on by the state courts, and since this appeal does not present a substantial federal question, we submit there is clearly no jurisdiction under Title 28 U. S. C. A. 1257(2) and respectfully request that this appeal be dismissed.

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APPENDIX

Ch. 32, Sec. 157.5, Illinois Revised Statutes—1961 (Sec. 5, Illinois Business Corporation Act of 1933, as amended)

"General powers

"Each corporation shall have power:

* * * * *

"(g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, provided, however, that no corporation organized under the laws of this state or licensed to transact business in this state shall directly or indirectly own or control 15% or more of the voting shares of each of two or more banks or of a company which is a bank holding company as defined in 'The Bank Holding Company Act of 1957', except to the extent permitted by the provisions of that Act and except that any such corporation may continue to own or control those voting shares it owns or controls on July 5, 1957.

* * * * *

"(i) To invest its surplus funds from time to time and to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned."

* * * * *

Ch. 32, Sec. 157.41, Illinois Revised Statutes—1961 (Sec. 41, Illinois Business Corporation Act of 1933, as amended)

"The board of directors of a corporation may declare and the corporation may pay dividends on its outstanding shares in cash, property, or its own shares, subject to the following provisions: * * *" (The provisions which follow are not here material.)

Ch. 32, Sec. 157.156, Illinois Revised Statutes 1961 (Sec. 156, Illinois Business Corporation Act of 1933, as amended)

"The provisions of this Act shall apply to all existing corporations, including public utility corporations, organized under any general law of this State providing for the organization of corporations for a purpose or purposes for which a corporation might be organized under this Act."

Ch. 110, Sec. 75, Illinois Revised Statutes 1961 (Sec. 75 Illinois Civil Practice Act of 1956, as amended)

"(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires."

Ch. 110, Sec. 101.39, Illinois Revised Statutes 1961 (Illinois Supreme Court Rule 39, as amended)

"No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Ch. 110, Sec. 201.7, Illinois Revised Statutes 1961 (Illinois Appellate Court Rule 7, as amended)

"No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Laws of Illinois, 1871-72, Corporations, Sec. 9, pages 299-300

(Sec. 9, Illinois General Corporation Act of 1872, as amended)

"§ 9. The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And, provided, further*, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation."